



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A LAWYER'S VIEW OF NAS ACQUISITIONS

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Acquisitions with the National Academy of Sciences

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The Department of Commerce regularly engages the National Academy of Sciences (NAS) to perform various research projects and prepare reports on different topics. There is a statutory provision regarding the performance of such work by NAS for government agencies which you should be aware of.

What is special about NAS?

The National Academy of Sciences is a nonprofit scientific institution established by congressional charter under 36 U.S.C. § 251. It is an honorary organization of more than 1,000 scientists and engineers elected to a lifetime membership because of their outstanding contributions to science. The Academy acts as an independent advisor to the Federal Government in matters of science and technology.

The statute provides that NAS shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art, the actual expense of such investigations, examinations, experiments, and reports, to be paid from appropriations which may be made for the purpose, but the academy shall receive no compensation whatever for any services to the Government of the United States (36 U.S.C. § 253). The Comptroller General has interpreted this provision to require NAS to perform research work for the United States upon request, but without compensation above the actual cost thereof. *Research Work Performed by National Academy of Sciences*, B-139864, 39 Comp. Gen. 71. Contracts with NAS must be structured so that it is paid only its actual costs incurred in performing the contract. No fees are permitted.

Agreements with NAS are otherwise governed by the same laws and regulations that apply to any other contractor. Selecting the type of agreement, whether contract, grant, or cooperative agreement shall be done in compliance with the Grants and Cooperative Agreements Act, 31 U.S.C. § 6301. See *Matter of Council on Environmental Quality and Office of Environmental Quality -- Cooperative Agreement with National Academy of Sciences*, B-218816, 65 Comp. Gen. 605. There is no special sole source authority for the government to enter into contracts or grants with NAS. The Department is not generally authorized to enter into noncompetitive contracts or financial assistance arrangements with NAS. A sole source justification for contracts must be supportable under the Competition In Contracting Act, 41 U.S.C. § 253. Competition is encouraged for

grants and cooperative agreements under 31 U.S.C. § 6301 and required under the Department's Administrative Order (DAO) 203-26. As always, specific statutory authority is required to enter in a grant or cooperative agreement with NAS or any other entity. See 65 Comp. Gen. 605, *supra*.

CBD waiver for NAS contracts

Under HCO Memo No. 87-54, a Determination and Findings (D&F) was provided which excuses the Department from issuing an advance CBD notice of acquisitions with NAS when the advice and services to be obtained are not available from the private sector. This D&F is effective through 1990. The D&F does not, however, support a sole source procurement from NAS.

Sole source contracts with NAS

There are, of course, some statutes which direct the Department to contract with NAS or one of its councils.

Under these circumstances, the exception under 41 U.S.C. § 253(c)(5) may be cited to support a sole source award to NAS. Some examples of such authority include 15 U.S.C.A. § 278n which states that the "Secretary of Commerce shall enter into contracts with the National Academies of Sciences and Engineering for a thorough review of the various types of arrangements under which the private sector in the United States and Federal Government cooperate in civilian research and technology transfer . . .". Under 15 U.S.C.A. § 278j, the Director of the National Institute of Standards and Technology (NIST) "may periodically contract with the National Research Council for advice and studies to assist the Institute to serve United States industry and science." Congress also established a Post-doctoral fellowship program at NIST in conjunction with NAS under 15 U.S.C.A. § 278g-2. The National Oceanic and Atmospheric Administration (NOAA) has also been directed by Congress to contract with NAS to study sea turtle mortality under the Endangered Species Act, P.L. 100-478, § 1008, 102 STAT 307, and to study yellow fin tuna under the Marine Mammal Protection Act, 16 U.S.C.A. § 1380(a)(2). In each of these instances, a sole source contract could be awarded to NAS because a statute expressly authorized that the procurement be made from a specified source as provided under 41 U.S.C. § 253(c)(5).



From the Editor - Staci LeBlanc is an attorney in the Contract Law Division who presently advises NIST on contract and financial assistance matters.
- Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-1122